

Office of Chief Counsel
Internal Revenue Service

memorandum

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GMHahn

date: JAN 04 2001

to: Jan Mindt, Appeals Officer, SBSE Area 9, Seattle

from: IRS Counsel, Seattle

subject: [REDACTED] Statute of Limitations

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ISSUE

Whether the statute of limitations is open for purposes of assessing the I.R.C. §§ 6721(a) and 6722(a) penalties for the [REDACTED] calendar year.

RELEVANT FACTS

[REDACTED] is a C corporation with a fiscal year ending [REDACTED]. [REDACTED]'s [REDACTED] fiscal year ended on [REDACTED]. During the [REDACTED] calendar year, [REDACTED] paid certain dividend to its shareholders. With respect to these dividends, [REDACTED] filed the "Payee Statements" (Form 1099-DIV) required by I.R.C. § 6042(c) on or about [REDACTED], and filed an "Information Return" required by I.R.C. § 6042(a)(1) on or about [REDACTED].

The Service initiated an examination of [REDACTED]'s corporate return (Form 1120) for the [REDACTED] taxable year and the "Payee Statements" and "Information Return" filed for the [REDACTED] calendar

year. In conjunction with the examination of these items, the Service requested a statute extension. On [REDACTED] an authorized agent of [REDACTED] executed a Form 872 to extend the statute of limitations to [REDACTED]. The Form 872 indicates that the statute extension applies to any "Federal Penalties and Income tax due on any returns made by the above taxpayer(s) for the period(s) ending [REDACTED] (with respect to income tax), [REDACTED] (with respect to furnishing returns regarding payments of dividends), and [REDACTED] (with respect to filing returns regarding payments of dividends)...."

Following the completion of the examination, the following penalties were proposed with respect to the filed information returns: (a) \$[REDACTED] penalty under I.R.C. § 6721(a)(1)¹ for the [REDACTED] calendar year for failure to file a correct information return; and (b) \$[REDACTED] penalty under I.R.C. § 6722(a)² for the [REDACTED] calendar year for failure to file correct "payee statements."

The case is currently assigned to Appeals Officer Jan Mindt. Counsel's advice has been sought on whether the statute extension obtained for the I.R.C. §§ 6721(a) and 6722(a) penalties is valid in spite of the erroneous dates listed on the Form 872 (i.e., the 872 lists the periods as "[REDACTED]" and "[REDACTED]" rather than the "calendar year ending [REDACTED]"). [REDACTED] has not raised or asserted that the Form 872 consent is invalid. Rather, this issue was raised by Appeals.

ANALYSIS

The "assessable penalties" provided by I.R.C. §§ 6721(a)(1) and 6722(a) are assessed and collected in the same manner as taxes.

¹I.R.C. § 6721(a)(1)-IMPOSITION OF PENALTY. In the case of a failure described in paragraph (2) by any person with respect to an information return, such person shall pay a penalty of \$50 for each return with respect to which such a failure occurs, but the total amount imposed on such person for all such failures during any calendar year shall not exceed \$250,000.

²I.R.C. § 6722(a)-FAILURE TO FURNISH CORRECT PAYEE STATEMENTS. In the case of each failure described in subsection (b) by any person with respect to a payee statement, such person shall pay a penalty of \$50 for each statement with respect to which such a failure occurs, but the total amount imposed on such person for all such failures during any calendar year shall not exceed \$100,000.

I.R.C. § 6671(a)³. Section 6501(a) establishes the general rule that taxes imposed by the Internal Revenue Code shall be assessed within 3 years after the return was filed. If no return is filed, Section 6501(c)(3) provides that the tax may be assessed at any time⁴. Exceptions to the general rule include section 6501(c)(4), which states:

Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

To obtain an extension, both parties must execute a written consent before the initial period of assessment has expired. Form 872, Consent to Extend the Time to Assess Tax, is used to extend the period of assessment to a specific date. A Form 872 is essentially a unilateral waiver of a defense by the taxpayer rather than a contract. Stange v. United States, 282 U.S. 270, 276 (1931); United States v. Gayne, 137 F.2d 522 (2d Cir. 1943); Tallal v. Commissioner, 77 T.C. 1291 (1981); Buchine v. Commissioner, T.C. Memo 1992-36. However, since section 6501(c)(4) requires that the parties reach a written agreement, the Courts have applied general contract principles to determine the existence of and scope of the Form 872. Kronish v. Commissioner, 90 T.C. 684, 693 (1988); Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983).

In cases where there has been an error on the face of the Form 872 with respect to the taxable period(s) to which the consent

³Subtitle F, Chapter 68B is titled "Assessable Penalties." Chapter 68B has two parts: Part I (General provisions, sections 6671 through 6715) and Part II (Failure to comply with certain information reporting requirements, sections 6721 through 6724). The term "tax" as used in Chapter 68B includes the penalties and liabilities provided by Chapter 68B. I.R.C. § 6671(a).

⁴The statute of limitations period for assessing information return penalties (I.R.C. §§ 6721 and 6722) is governed by I.R.C. § 6501. See IRM Handbook No. 4.3.4, Section 10.9. If no information return is filed, the penalties may be assessed at any time. Id. Also see Audit Technique Guide for Manufacturing Industry, Chapter 3, "Information Returns Statute of Limitations," Training 3147-115 (May 1998), TPDS 84893N.

relates, the Court have looked at extrinsic evidence to ascertain the intent of the parties. See Buchine v. Commissioner, 20 F.3d 173 (5th Cir. 1994), aff'g T.C. Memo 1992-36 (A Form 872 which listed the wrong taxable year was effective to extend the statute for the proper year based on the clear evidence which demonstrated that both the taxpayers and the IRS understood that the consent applied to the proper year); Atkinson v. Commissioner, T.C. Memo 1990-37 (A notice of deficiency for the 1981 tax year was deemed to have been timely mailed where the taxpayer signed a Form 872-A. The fact that the Form 872-A had, due to a typing error, mistakenly identified the taxable period as 1984 did not override the other evidence showing that both the taxpayer and the IRS always understood the consent applied to the 1981 taxable year). Reformation of a Form 872 is warranted where there is clear and convincing evidence that the writing contains a "scrivener's mistake" such as a mistake in drafting the dates on a Form 872. See Woods v. Commissioner, 92 T.C. 776, 782, 789 (1989) (Reformation is an equitable remedy used to reframe written contracts to reflect the real agreement between the parties when, because of mutual mistake, the writing does not embody the contract as actually made.)

In the case at hand, the evidence in the administrative file clearly indicates that [REDACTED] knew that the IRS was examining the information returns filed for the [REDACTED] calendar year. Form 4665, dated [REDACTED], refers to the information returns filed for the [REDACTED] calendar year and indicates that the statute of limitations for these information returns needs to be protected as 1099-DIV's were filed. On [REDACTED], [REDACTED] signed a Form 872 to extend the statute of limitations for the information returns filed on [REDACTED] and [REDACTED]. Although the Form 872 should have listed the dates as "[REDACTED] calendar year" rather than "[REDACTED] and [REDACTED]", it is clear from the evidence in the administrative file that the [REDACTED] knew and intended that the Form 872 relate to the information returns filed for the [REDACTED] calendar year⁵. As such, should [REDACTED]

⁵Distributions to shareholders are reported on Form 1099-DIV. Treas. Reg. § 1.6042-5; Prop. Treas. Reg. § 1.6042-4. The Form 1099 must be furnished to the payee on or before January 31 of the calendar year in which the dividend was paid. I.R.C. § 6042(c). A copy of the Form 1099-DIV must be transmitted to the IRS with Form 1096 on or before February 28 of the calendar year following the payment of the dividend. All corporations, even those on a fiscal year, are required to file the information returns based on the calendar year. Thus, in the case at hand, it would be difficult for [REDACTED] to argue that the dates listed on the Form 872 apply to a taxable period other than the [REDACTED] calendar year.

subsequently decide to contest the validity of the statute extension on the Form 872, it is likely that a Court would find that there had been a "scrivener's mistake" in drafting the Form 872, that reformation of the Form 872 was required to reflect the agreement reached between the parties. See Woods, supra.

CONCLUSION

The Form 872 consent to extend the statute of limitations for the I.R.C. §§ 6721(a)(1) and 6722 "assessable penalties" is valid despite the drafting error on Form 872 as the evidence clearly demonstrates that the parties intended the Form 872 consent to apply to the information returns filed for the [REDACTED] calendar year. Counsel believes that a Court would "reform" the dates on the Form 872 consent to conform to the agreement of the parties if [REDACTED] were to argue that the statute of limitations had lapsed for assessing the section 6721 and 6722 penalties.

Should you have any questions in this matter, please contact the undersigned at (206) 220-5954.

/s/ GmH

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